

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
August 13, 2004 Session

**IN THE MATTER OF: C.E.P.  
(DOB: March 19, 1994)**

**Appeal from the Chancery Court for Anderson County  
No. 00CH0609 William E. Lantrip, Chancellor**

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**No. E2003-02410-COA-R3-PT**

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This is an adoption case in which the petitioners seek to terminate the parental rights of the biological father of C.E.P. (“the child”). A.E.P. (“Mother”), the biological mother and custodian of the child, joined her husband, M.P.P. (“Stepfather”), in petitioning the trial court to terminate the parental rights of D.L.K. (“Father”), as an adjunct to Stepfather’s petition to adopt the child. The trial court granted the petitioners’ motion for summary judgment and terminated Father’s parental rights on the basis of his incarceration. On Father’s initial appeal, we affirmed the finding of grounds for termination, but vacated the trial court’s best interest finding. On remand, the trial court conducted a hearing and found that termination of Father’s parental rights was in the best interest of the child. Father appeals. We reverse and dismiss.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court  
Reversed; Case Dismissed**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and WILLIAM H. INMAN, SR.J., joined.

David S. Clark, Oak Ridge, Tennessee, for the appellant, D.L.K.

N. David Roberts, Jr., Knoxville, Tennessee, for the appellees, M.P.P. and A.E.P.

**OPINION**

**I.**

The child was born out of wedlock to Mother and Father on March 19, 1994. Shortly after the child’s first birthday, Father was arrested, and on August 28, 1995, he was convicted of bank robbery and sentenced to 130 months in prison. Sometime in 1996, Mother married Stepfather, and over the next five years, they had two children together.

On July 25, 2000, Mother joined Stepfather in his petition to adopt the child. Both requested the trial court to terminate Father's parental rights to the child, on the basis of, *inter alia*, abandonment due to incarceration. Father answered the petition, denying that grounds for termination existed. Mother and Stepfather then filed a motion for summary judgment.

The trial court granted the petitioners' motion on March 1, 2001, finding as follows:

The Court finds that there exists a basis to terminate [Father's] rights. Since at the time of this hearing he was incarcerated in prison for a period of 130 months the statutory basis for termination exists. I further find that termination of [Father's] rights would be in the best interest of this child. . . .

Father appealed these findings, and we released our decision on March 26, 2002, finding that "the undisputed material facts establish the ground for termination of Father's parental rights under Tenn. Code Ann. § 36-1-113(g)(6)."<sup>1</sup> ***M.P.P v. D.L.K.***, No. E2001-00706-COA-R3-CV, 2002 WL 459010, at \*5 (Tenn. Ct. App. E.S., filed March 26, 2002). However, with respect to the trial court's best interest finding, we opined as follows:

Since Mother's and Father's affidavits create a genuine issue of material fact regarding whether termination of Father's parental rights would be in the best interest of the Child, the Motion for Summary Judgment should have been denied. Accordingly, we hold it was error to grant partial summary judgment as a matter of law to Mother and Stepfather on the issue of whether the Child's best interests would be served by terminating Father's parental rights. We vacate the Trial Court's grant of partial summary judgment as a matter of law to Mother and Stepfather on this issue only. On remand, the Trial Court is, through appropriate proceedings, to determine whether terminating Father's parental rights would be in the Child's best interests, and to enter an order within 30 days of the hearing's conclusion containing specific findings of fact and conclusions of law as required by Tenn. Code Ann. § 36-1-113(k).

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<sup>1</sup>Tenn. Code Ann. § 36-1-113(g)(6) (Supp. 2003) provides as follows:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

\* \* \*

(6) The parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court.

*Id.*, at \*7.

Upon remand, the trial court conducted a hearing on March 20, 2003, at which Mother, Stepfather, and Father all testified. Father, who was still incarcerated, was allowed to fully participate in the hearing telephonically via speakerphone. On May 8, 2003, the trial court filed its opinion, finding as follows:

I have reviewed the briefs and argument submitted by both the petitioners and defendant. I find that termination of [Father's] parental rights and the adoption of this child by [Stepfather] is in the child's best interest.

I specifically find that [Father] has had no contact whatsoever with the child since shortly prior to August, 1995 when [Father] was sentenced to prison for bank robbery. There is further no relationship with any of [Father's] family. In fact there has existed no meaningful relationship except for a brief period immediately following the child's birth.

I find that [Stepfather] married [Mother] and has essentially raised [the] child since his marriage to [Mother]. This marriage has produced two other children. I find that there exists a loving relationship between [the] child and [Stepfather]. [The child] is bonded with him and supported both emotionally and financially. [Mother and Stepfather] have demonstrated their ability to provide a permanent and loving home.

For these reasons I find that termination of [Father's] parental rights are justified by the evidence and would be further in the child's best interest. . . .

On the day the trial court's opinion was filed, the trial court entered its judgment terminating Father's parental rights and granting Stepfather's petition to adopt the child. In that judgment, the trial court made very few, if any, findings of fact; instead, the judgment was replete with summaries of the parties' testimony. For the most part, the testimony of Father was in opposition to that of Mother and Stepfather. The court did, however, state that, based upon the proof presented by the parties at the hearing, it found "clear and convincing evidence that termination of [Father's] parental rights [was] in the best interest of the child as required by Tenn. Code Ann. [§] 36-1-113(c)(2)."

Following the entry of the trial court's order, Father filed a motion to alter or amend, and moved the court to make additional findings of fact. On September 2, 2003, the trial court filed an opinion in which it made the following findings of fact:

That [Mother and Stepfather] never refused any mail or telephone calls from [Father].

That [Father] sent Birthday and Christmas cards to the child for the first couple of years that were given to the child.

That [Father] last spoke to [Mother] in the October-November time period of 1995.

That [Mother and Stepfather] do have an unlisted telephone number but no proof existed that [Father] sought this number at any time.

That [Father] did make calls from prison to the parents of [Mother] that were refused.

That [Father] had little contact with the child prior to his arrest and incarceration.

That [Father] had developed relationships with other women and would briefly reside with [Mother] and [the] child when [Mother] assisted [Father] and provided him with a place to stay when he had no other place to stay. Such occasions resulted in [Mother] and their 11 month child being forced by [Father] to vacate her own apartment.

That there existed no meaningful relationship between [the] child and [Father] except for a brief period of time dating back to November, 1995.

That the child has essentially been raised by [Stepfather] and considers him to be her father.

That [Stepfather] is clearly capable to provide a permanent and loving home for this child.

(Numbering in original omitted). Thereupon, Father appealed.

## II.

Our review of this non-jury case is *de novo*; however, the record comes to us accompanied by a presumption of correctness that we must honor unless the evidence preponderates against the trial court's findings. Tenn. R. App. P. 13(d). No presumption of correctness attaches to the lower court's conclusions of law. **Jahn v. Jahn**, 932 S.W.2d 939, 941 (Tenn. Ct. App. 1996).

## III.

"[P]arents have a fundamental right to the care, custody, and control of their children." **In re Drinnon**, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing **Stanley v. Illinois**, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). However, this right is not absolute and may be terminated if there is clear and convincing evidence justifying termination under the pertinent statute. **Santosky v. Kramer**, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Clear and convincing evidence is evidence which "eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." **O'Daniel v. Messier**, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

The issues raised in the pleadings, and the trial court's findings, cause us to focus on the following statutory provisions:

*Tenn. Code Ann. § 36-1-113 (Supp. 2003)*

(c) Termination of parental or guardianship rights must be based upon:

(1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and

(2) That termination of the parent's or guardian's rights is in the best interests of the child.

\* \* \*

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

#### IV.

Father essentially raises three issues for our consideration: (1) whether the trial court erred in finding, by clear and convincing evidence, that termination of Father's parental rights was in the best interest of the child; (2) whether the trial court abused its discretion in denying Father's request to appear at the hearing in person; and (3) whether Father's release from incarceration "before the entry of a final order renders moot that basis for terminating [his] parental rights."

A.

Father first contends that the trial court erred in finding, by clear and convincing evidence, that terminating Father's parental rights was in the child's best interest.

The termination of parental rights requires a two-part analysis. In addition to finding that grounds for termination were proven by clear and convincing evidence, the trial court must find – again by clear and convincing evidence – that termination is in the best interest of the child, when that evaluation is made in light of the factors set forth in Tenn. Code Ann. § 36-1-113(i). We will examine each of these factors in turn.

The first factor addresses the parent's adjustment of circumstances so as to make it safe and in the child's best interest to be in the home of the parent. *See* § 36-1-113(i)(1). Our review of the evidence in the instant case reveals a dearth of clear and convincing evidence that Father has not made adjustments in his life so as to make it safe for the child to be in his home. On the contrary, there is ample evidence in support of the positive changes Father has made, as stated in the trial court's final judgment:

[Father] testified that while incarcerated that he has obtained seven years of vocational education, he has received treatment for his substance abuse issues, he has received mental health counseling and that he is a changed person as a result.

Mother and Stepfather offered nothing to refute this testimony. Upon Father's motion before this court, we allowed Father to submit a supplementary brief to address appropriate post-judgment facts. In that brief and Father's accompanying affidavit, Father states that he was released from prison on March 9, 2004, "at the earliest possible date owing to good behavior." Father requested to be released to a halfway house in Knoxville, so that he could be close to the child; this request was granted. According to Father's affidavit, he was given permission to leave the halfway house and establish a private residence in June, 2004. In addition, Father obtained employment as a fabric cutter for men's custom suits with Cole Rich Custom Clothes at the John H. Daniels Company. The owner of another company who was visiting the Cole Rich facility took an interest in Father's work:

He thought I had the ability to manage other employees in the operation of a sophisticated fabric cutting machine and has offered me employment beginning May 17, 2004 on a salary basis and at a substantial raise supervising cutting operations and other employees. I have accepted this employment and provided notice to my employer of the pending change in employment.

Finally, Father points out that he has paid and is continuing to pay debts that he incurred before his incarceration, "even though [he] could have claimed insolvency or bankruptcy," choices that Father has never made. Based upon all of this evidence, we find that there is overwhelming proof that

Father has made positive adjustments in his life, and such adjustments leave no reason to believe that it would not be safe for the child to be in Father's home, to the extent that visitation may be allowed there.

The second factor, whether the parent has failed to make a lasting adjustment after the reasonable efforts of social services agencies, is not applicable in this case, as social services were never involved with Father or the child. *See* § 36-1-113(i)(2). The third factor is likewise inapplicable, as it relates to the parent maintaining regular visitation with the child. *See* § 36-1-113(i)(3). Due to Father's incarceration, he was unable to seek or exercise regular visitation with the child.

With respect to the fourth factor, whether a meaningful relationship has been established between the parent and the child, *see* § 36-1-113(i)(4), the trial court specifically found that "there has existed no meaningful relationship [between Father and the child] except for a brief period immediately following the child's birth." While this is true, it is due to Father's incarceration, which has prevented him from developing a relationship with the child.

Factor number five contemplates the effect that a change of caretakers would have on the child. *See* § 36-1-113(i)(5). Our decision does not contemplate a change in caretakers and we are not suggesting that Father be awarded custody of the child. Indeed, Father makes it abundantly clear that, at this time, he is seeking only visitation rights with the child. Accordingly, the fifth factor is not applicable in this case.

The sixth factor relates to the parent abusing or neglecting the child in some manner. *See* § 36-1-113(i)(6). There is absolutely no clear and convincing evidence that Father has ever physically, sexually, emotionally, or psychologically abused the child, or any other child or adult in Father's family or home. With respect to the seventh factor, there is no proof whatsoever that Father's home is unhealthy or unsafe, that there is any criminal activity in the home, or that there is any abuse of alcohol or a controlled substance in Father's home. *See* § 36-1-113(i)(7).

The eighth factor addresses the mental and/or emotional state of the parent and whether it is such that it would be detrimental to the child and would prevent the parent from properly caring for the child. *See* § 36-1-113(i)(8). Again, there is no clear and convincing evidence that the Father suffers from any mental or emotional health problems that would interfere with his care and supervision of the child. Finally, the ninth factor, which relates to the payment of child support, is not applicable in the instant case, due to Father's incarceration. *See* § 36-1-113(i)(9).

In its opinion, it appears that the only factors the trial court focused on were Father's lack of a relationship with the child and his failure to have any contact with the child. In fact, it seems that, in making its best interest determination, the trial court was more focused on the loving and supportive relationship the child had with Stepfather. While the nine aforementioned factors are not exhaustive and while the statute contemplates the consideration of other factors, the simple fact that



the child is bonded with the stepparent is not enough, without more, to justify the termination of her biological father's parental rights.

In short, we find that the evidence preponderates against the trial court's determination that there is clear and convincing evidence that termination of Father's parental rights is in the best interest of the child.

B.

Next, Father contends that the trial court abused its discretion in denying Father's request to appear at the hearing in person.

Tenn. Code Ann. § 36-1-113(f) (Supp. 2003) provides, in pertinent part, as follows:

Before terminating the rights of any parent or guardian who is incarcerated . . . , it must be affirmatively shown to the court that such incarcerated parent or guardian received actual notice of the following:

\* \* \*

(3) That the incarcerated parent or guardian has the right to participate in the hearing and contest the allegation that the rights of the incarcerated parent or guardian should be terminated, and, *at the discretion of the court*, such participation may be achieved through personal appearance, teleconference, telecommunication or other means deemed by the court to be appropriate under the circumstances;

(Emphasis added).

In the instant case, the trial court, exercising its discretion, determined that Father would participate in the hearing via teleconference. In order to accommodate Father, the trial court moved the hearing from Clinton to Maryville, apparently due to the fact that the Maryville courtroom had state-of-the-art teleconferencing equipment. This court has previously held that the decision of whether to allow a prisoner to be physically present at a hearing lies within the sound discretion of the trial court. See *Davis v. Jensen*, No. M2001-00973-COA-R3-CV, 2002 WL 31528525, at \*7 (Tenn. Ct. App. M.S., filed November 15, 2002); *Rice v. Bradberry*, No. 02A01-9809-CH-00239, 1999 WL 86980, at \*2-\*3 (Tenn. Ct. App. W.S., filed February 23, 1999). We find no abuse of discretion in the trial court's decision to order the participation of Father via teleconference, and we therefore find this issue adverse to Father.

C.

Father's final issue addresses itself to this Court's previous finding that the trial court properly found grounds to terminate his parental rights. Father contends that, as grounds for termination were based upon his receiving a prison sentence of at least ten years, and because Father was released from prison after serving only eight and one-half years, the finding that grounds for termination existed should be overturned. We disagree. In *Harrison v. Laursen*, 128 S.W.2d 204 (Tenn. Ct. App. 2003), we opined as follows:

The ruling of an appellate court becomes the law of the case that is binding on the parties and the trial court on remand. The law of the case doctrine generally prohibits reconsideration of issues actually decided or necessarily decided by implication in a prior appeal in the same case.

*Id.* at 208 (internal citations omitted). In the instant case, because we upheld the trial court's finding of grounds for termination in the first appeal, our decision became the law of the case and that issue cannot now be revisited on this subsequent appeal. Father's final issue is without merit.

V.

The judgment of the chancery court is reversed and the adoption petition is hereby dismissed with costs at the trial court level assessed to the appellees, M.P.P. and A.E.P. Costs on appeal are taxed to the appellees, M.P.P. and A.E.P.

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CHARLES D. SUSANO, JR., JUDGE